No. 49191-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

EDWIN A. LIZARRAGA-CANCHE, Appellant.

Appeal from the Superior Court of Clark County
The Honorable Bernard Veljacic
No. 16-1-00278-1

BRIEF OF APPELLANT EDWIN LIZARRAGA-CANCHE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Statutory Provision

Rules

I. ASSIGNMENTS OF ERROR

1. The Admission of Mr. Lizarraga-Canche's Post-Miranda Statements Without a Knowing and Intelligent Waiver of His Miranda Rights, Was Error.
2. Mr. Lizarraga-Canche's Conviction for Bail Jumping, After Jeopardy Had Terminated, Was Error.
3. The State's Closing Argument, Misstating the Law, Was Error.
4. The State's Closing Argument, Misstating the Burden of Proof, Was Error.
5. Defense Counsel's Failure to Object to the Jury Instructions, Was Error.
6. Defense Counsel's Failure to Object to the State's Misstatement of the Law and Misstatement of the Burden of Proof, Was Error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May a trial court admit post-Miranda statements, in response to custodial interrogation, without making a finding that there was a knowing and intelligent waiver of the Miranda rights?
2. May a trial court allow the State to reopen its case after the

State rests and the court grants a defense motion to dismiss for insufficient evidence?

3. Does jeopardy terminate when a court makes a finding that the State has presented insufficient evidence, barring the State from reopening its case under the double jeopardy clause?
4. Does a person knowingly and intelligently waive their Miranda rights English is their second language, they speak conversational English, but did not understand that they had a right to speak to an attorney prior to answering questions, and where they were not advised of their rights in Spanish or offered an interpreter?
5. Does a prosecutor commit misconduct when they argue to the jury, in contradiction to the law and jury instructions, that a person knows something if they have knowledge that would lead a reasonable person to know something?
6. Does a prosecutor commit misconduct by misstating the burden of proof when they argue that in order to find the defendant not guilty, the jury must find that a person can escape criminal responsibility by ignoring facts and wishing away knowledge?

III. STATEMENT OF THE CASE

1. 3.5 Hearing.

Mr. Lizarraga-Canche was stopped at 5:00 a.m. for not having a license plate. (RP 47-49). The officer could see what appeared to be a trip permit in the back window, but the window was icy. (RP 48).

The officer asked Mr. Lizarraga-Canche if the vehicle was his and he said he just bought it. (RP 49). Then, he said it was his friend's. (RP 49). The officer learned that the car was stolen and detained him. (RP 50). He was advised of his Miranda warnings in English. (RP 52). The officer testified that he asked her to repeat the warnings because her radio was too loud, and after she repeated them, he stated that he understood. (RP 50-52).

The officer testified that Mr. Lizarraga-Canche spoke with an accent, but appeared to understand her, and said he was okay speaking to her in English. (RP 52-54).

> Q: And that he knew his rights and wanted to speak with you. Did it appear that English was Mr. Lizarraga-Canche's first language??
>
> A: He spoke with an accent. He informed me he spoke Spanish. I asked him if he was comfortable speaking in English as I don't speak Spanish. He said he was fine with it.
>
> Q: Okay. Did he make any other comments about his ability to speak English?

A: No.

(RP 52-53).

The officer testified that she has used an interpreter in the past and could not remember if she ever offered Mr. Lizarraga-Canche an interpreter. (RP 53-54).

The transcripts indicate that Mr. Lizarraga-Canche said he did not want to speak to the officer, but that appears to be inconsistent with the arguments of counsel and the recording in this matter. (RP 52). Post-Miranda, Mr. Lizarraga-Canche made additional statements to the officer after he was detained in the back of her patrol car. (RP 54).

Mr. Lizarraga-Canche testified that he grew up in Mexico and spoke Spanish until he was twelve years old. (RP 67). He came to the United States in 2002. (RP 67). He testified that he speaks both English and Spanish at work and with friends. (RP 69).

Mr. Lizarraga-Canche testified that he told the officer that he did not understand the Miranda warnings because they were confusing, not because the radio was too loud. (RP 71). He testified that he understood he could be quiet, but if he'd understood the warnings, he would have not talked to the officer and would've waited to speak to an attorney. (RP 72-73). He testified that he didn't remain silent because the officer kept

asking him questions. (RP 75). He said, "Well I tried to answer her. I didn't want to get into any – any trouble." (RP 72).

An interpreter was present during the trial. (RP 29).

Mr. Lizarraga-Canche moved to suppress his statements because Mr. Lizarraga-Canche did not understand and knowingly and intelligently waive his Miranda rights. (RP 87).

The court found that Mr. Lizarraga-Canche was detained when he was put into the back of the patrol car. (RP 91). That, at that time, the officer advised him of his Miranda warnings. (RP 91). The court found that he understood the rights because he said he was okay proceeding in English and that he told the officer he understood. (RP 92-93). The court never made any findings about whether Mr. Lizarraga-Canche waived his Miranda rights. (RP 92-93). The court found that the post-Miranda statements were admissible because Mr. Lizarraga-Canche understood his rights "[y]et he continued to answer freely – never told her to stop." (RP 93).

2. Stolen Vehicle.

Mr. Lizarraga-Canche needed a car to get to and from work. (RP 407-08). He had a friend "Tuey" who had a lot of cars on his property. (RP 409). A Honda had been parked at Tuey's, it was rusty, had paint coming off, didn't run, and was in bad condition. (RP 396). The Honda

had been abandoned on the property, which was in a wooded area. (RP 394, 398). Tuey said he needed to get rid of the car and Mr. Lizarraga-Canche said he needed a car, so Tuey told him that he could take it. (RP 398, 410). Tuey testified that he told Mr. Lizarraga-Canche that it had been abandoned and he didn't know if it was stolen. (RP 398). Mr. Lizarraga-Canche fixed the car and got it running. (RP 399, 411). Sara Scuito testified that she drove Mr. Lizarraga-Canche to Tuey's to get the car in January of 2016. (RP 369-70). There were no keys, so he used a screwdriver to start the car. (RP 412). When Mr. Lizarraga-Canche got the car it was wet and moldy. (RP 412).

Mr. Lizarraga-Canche testified that his girlfriend looked on a website to see if the car was stolen and the website said the car was clean. (RP 414-15). He testified that he didn't think the car was stolen and he planned to go to the DMV and try to get a title. (RP 411). He had the car about a week before he was stopped. (RP 414).

On February 2, 2016, at 4:50 a.m. police stopped a silver Honda for no rear license plate. (RP 101). The officer contacted the driver, Edwin Lizarraga-Canche and asked if it was his vehicle; he said he just bought it. (RP 105). The officer asked him when he bought it and he said it was actually his friend's. (RP 105). The officer asked for license, registration, and insurance. (RP 106). Mr. Lizarraga-Canche gave the

officer his identification and insurance for a truck; he did not have any other paperwork. (RP 106). A search of the VIN revealed that the car had been reported stolen. (RP 106-07).

The officer asked Mr. Lizarraga-Canche to turn the vehicle off; he looked around the car and told the officer that he was looking for a screwdriver to turn the car off. (RP 107). The officer then noticed that the ignition had been punched and the radio was missing. (RP 108).

There was a trip permit in the back window that had been altered. (RP 119-20). The expiration date was dated after the date of the stop. (RP 157).

Mr. Lizarraga-Canche was told to get out of the car, frisked, and Mirandized, and detained in the patrol car. (RP 111-12). The officer asked about the car and he said that his friend gave him the car because he needed one. (RP 112). The officer continued to question him and he said got the car from Ricardo Rodriguez at the Robin Wood apartments. (RP 112). The officer asked more questions and Mr. Lizarraga-Canche said Ricardo dropped off the car at his job. (RP 113). The officer asked for Ricardo's phone number and Mr. Lizarraga-Canche said he didn't know it. (RP 113). Mr. Lizarraga-Canche said Ricardo told him that he lost the keys and used a screwdriver to start the car. (RP 115). He said he thought it was a little strange. (RP 115).

The officer offered to go talk to Ricardo to clear this up, but Mr. Lizarraga-Canche said he didn't want to because he didn't want to get more people in trouble. (RP 116, 138-39). The officer asked Mr. Lizarraga-Canche if he was willing to take the fall for this. (RP 154).

After Mr. Lizarraga-Canche had been arrested, police contacted Jason Jenista. (RP 185). He was not the registered owner, but he had the title, registration, a bill of sale, and the keys to the car. (RP 185). Mr. Jenista testified that he bought the car in June 2015 from someone on Craig's List. (RP 283-84). He had parked the car and in the morning on June 15, 2015, it was gone. (RP 286). At the time, the ignition worked and there was a radio. (RP 287, 297-98). When the car was returned, it had mildew and mold that wasn't there before. (RP 297-98).

3. Bail Jump.

On February 17, 2016, Mr. Lizarraga-Canche was arraigned on one count of possession of a stolen vehicle. (RP 197). At that time, a readiness hearing was scheduled for April 7, 2016. (RP 201). An interpreter was present at the hearing. (RP 202-03).

At readiness, people sign in and then cases are called as the prosecutor goes down the list. (RP 209). On April 7, 2016, Mr. Lizarraga-Canche did not appear or answer when his case was called. (RP 211).

The State did not call the interpreter in its case in chief and rested. At the end of the State's case, Mr. Lizarraga-Canche made a motion to dismiss for insufficient evidence. (RP 301). He argued that the State did not call the interpreter and therefore could not prove what Mr. Lizarraga-Canche had been told. (RP 303).

The court found that the State had not established that Mr. Lizarraga-Canche knew about the court date and his requirement to appear without testimony from the interpreter. (RP 318-20). The court held, "So I do think the knowledge element is failing and so on that basis I will grant the Motion." (RP 319). After ruling on the sufficiency of the evidence, the court considered, and granted, the State's motion to reopen its case to call the interpreter. (RP 322-23). Later, after granting Mr. Lizarraga-Canche's motion to dismiss for insufficient evidence, and then letting the State reopen its case, that it did not dismiss the bail jumping charge. (RP 341).

> I believe I might have indicated that I dismissed the charge but my – to be clear – I felt it was insufficient at the time – the bail jump that is – based on the knowledge prong and the interpretation issue.
>
> Prior to dismissing though my intent was to allow the State to reopen their case and I think under Brinkley I'm allowed to do that.

(RP 341).

The State then called the interpreter, who testified that she had no independent memory of Mr. Lizarraga-Canche's arraignment, but she reviewed the video. (RP 350-51). She testified that the arraignments are very fast hearings. (RP 359). That Mr. Lizarraga-Canche was brought out twice, the first time, he was advised of the April 7th date, but not told it was mandatory or what a readiness hearing was. (RP 360). The second time he was advised about mandatory appearance and bail jumping charges, but the dates were not repeated. (RP 361). The forms Mr. Lizarraga-Canche were given were in English, not Spanish. (RP 363). And, the interpreter testified that he appeared to be listening to her in Spanish, not listening to the court in English. (RP 358).

Mr. Lizarraga-Canche testified that he cannot read English and he thought his court date was 4/17, not 4/7. (RP 424). He called his attorney on April 14th to confirm the date and then set a hearing when he realized he'd missed court. (RP 424-25).

The scheduling order reads 4 – 7 – 16. (CP 5). However, the supervised release order states your next court date it is 4/7/16, but is written so that it looks like 417/16 or 4 17/16. (CP 6).

4. Closing Arguments.

The State, in its closing arguments, argued:

To find the Defendant not guilty ladies and gentlemen you

> have to say that any person can escape criminal responsibility by simply ignoring the facts that are readily available and which they actually know – that a Defendant can avoid all consequences by wishing away knowledge. So ladies and gentlemen he did know.

(RP 482).

I. ARGUMENT

1. Mr. Lizarraga-Canche's Post-Miranda Statements Should Have Been Suppressed Because He Did Not Knowingly and Intelligently Waive His Miranda Rights.

A person who has been advised of their Miranda rights may waive those rights, but only if the waiver is made knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966); *see also* U.S. Const. amend. V, VI; WASH. CONST. Art. I, §§ 9, 22. A reviewing court reviews the waiver of Miranda de novo because it is a constitutional issue. *See State v. Mennegar*, 114 Wash.2d 304, 309–10, 787 P.2d 1347 (1990); *State v. Flowers*, 57 Wash. App. 636, 641, 789 P.2d 333, *review denied*, 115 Wash.2d 1009, 797 P.2d 511 (1990).

A waiver may be express or implied. *State v. Terrovona*, 105 Wash.2d 632, 646, 716 P.2d 295 (1986). There is a presumption that a defendant did not waive his rights. *N. Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979). It is the State's burden to establish that the defendant was fully advised of his rights, understood them, and knowingly and intelligently waived them. *Terrovona*, 105 Wash.2d at

646; *State v. Reuben*, 62 Wash. App. 620, 625, 814 P.2d 1177, *review denied*, 118 Wash.2d 1006, 822 P.2d 288 (1991).

The State cannot show a waiver of the right to counsel if the defendant did not understand the warning. *Seattle v. Gerry*, 76 Wn.2d 689, 692, 458 P.2d 548 (1969). "[L]anguage barriers may inhibit a suspect's ability to knowingly and intelligently waive his *Miranda* rights, [unless] a defendant is advised of his rights in his native tongue and claims to understand such rights . . . ." *See United States v. Boon San Chong,* 829 F.2d 1572, 1574 (11th Cir.1987).

In this case, it was clear to the officer that English was not Mr. Lizarraga-Canche first language. The officer asked Mr. Lizarraga-Canche if he was comfortable speaking in English because she does not speak Spanish and he indicated it he was fine. However, the officer made no attempts to read his rights in Spanish or contact an interpreter. She testified that she did not remember whether she ever offered to contact an interpreter.

Mr. Lizarraga-Canche testified that he grew up in Mexico, speaks primarily Spanish, does speak and understand some English, but did not fully understand his Miranda rights, and if he had, he would not have spoken to the officer. He testified that he would have been more comfortable speaking in Spanish. He also testified that he spoke to the

officer because she was asking questions and that he tried to answer her because he didn't want to get in trouble.

The trial court erred by finding that Mr. Lizarraga-Canche understood his rights. More importantly, the court never made any finding that Mr. Lizarraga-Canche knowingly and intelligently waived those rights. Given the language barrier, Mr. Lizarraga-Canche's testimony, the fact that the officer never went over his rights in Spanish, and that there is no evidence that he was offered an interpreter, the State did not establish that Mr. Lizarraga-Canche understood and knowingly and intelligently waived his rights.

2. The Court Erred By Allowing the State to Reopen Its Case After Jeopardy Had Attached and Terminated, in Violation of Double Jeopardy.

Double jeopardy claims are reviewed de novo. *State v. Hughes*, 166 Wash.2d 675, 681, 212 P.3d 558 (2009). Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *State v. Turner*, 169 Wash.2d 448, 454, 238 P.3d 461 (2010); WASH. CONST. art I, § 9, U.S. CONST. amend. V.

Generally, double jeopardy bars trial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c)

the defendant is again in jeopardy "for the same offense." *State v. Corrado*, 81 Wash. App. 640, 645, 915 P.2d 1121, 1124 (1996), citing *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984); *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975); *State v. Higley*, 78 Wash. App. 172, 902 P.2d 659, *review denied*, 128 Wash.2d 1003, 907 P.2d 296 (1995). In a jury trial, jeopardy attaches when a jury is sworn in. *Id.* at 646. Jeopardy terminates an acquittal. *Id.* "Insufficient evidence is equivalent to an acquittal, because no rational trier could find all essential elements of the crime charged." *Id.*, citing *Richardson*, 468 U.S. at 325, 104 S.Ct. at 3086.

In this case, jeopardy attached when the jury was sworn in. Jeopardy terminated when the court found that there was insufficient evidence to prove that Mr. Lizarraga-Canche had knowledge of his court date. Therefore, the State was barred from trying him on the bail jumping charge. While the court may have discretion to allow the State to reopen its case, it cannot allow the State to reopen its case *after* it has made a finding of insufficient evidence and jeopardy has terminated. Therefore, Mr. Lizarraga-Canche's conviction for bail jumping violates double jeopardy and must be vacated and dismissed.

3. The State Committed Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

a. *The State Misstated the Law Regarding Knowledge.*

When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wash. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wash.2d 757, 764, 675 P.2d 1213 (1984).

For both the possession of a stolen vehicle charge and the bail jumping charge, the State had to prove beyond a reasonable doubt that Mr. Lizarraga-Canche's knowledge. For possession of a stolen vehicle, the State had to prove that Mr. Lizarraga-Canche knew that the car was stolen. RCW 9A.56.068, (CP 84-85). For bail jumping, the State had to prove that Mr. Lizarraga-Canche had knowledge of the requirement of a subsequent personal appearance. RCW 9A.76.170, (CP 89-90). The jury was instructed that it was *permitted*, but *not required* to find knowledge if it found that Mr. Lizarraga-Canche had knowledge that would lead a reasonable person to believe that a fact exists. (CP 88).

In direct contradiction of the law and instructions of the court, the State argued:

> To find the Defendant not guilty ladies and gentlemen you have to say that any person can escape criminal responsibility by simply ignoring the facts that are readily available and which they actually know – that a Defendant can avoid all consequences by wishing away knowledge.
>
> So ladies and gentlemen he did know.

(RP 482). The jury was permitted to find that even if Mr. Lizarraga-Canche had facts that would lead a reasonable person to know that the car was stolen and that he was required to appear in court on a particular day, that he, due to a language barrier, lack of intelligence, or for any other reasons, did not know that the car was stolen and/or that he was required

to appear in court on a particular day. His knowledge was the issue at trial. Therefore, the State's misstatement of the law was extremely prejudicial.

b. *The State Shifted the Burden of Proof.*

It is improper for a prosecutor to misstate the burden of proof. *See State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). In *Johnson*, the State misstated the burden of proof in its closing argument, arguing that in order to find the defendant not guilty, the jurors had to have a reason to doubt and implied that the jurors must convict unless they had a reason not to. *Id.* Defense counsel neither objected nor requested a curative instruction. *Id.* at 683. However, the court held that this argument was "flagrant, ill-intentioned and incurable by a trial court's instruction in response to a defense objection." *Id.* at 685. "[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86, citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). Therefore, the court held that the argument constituted prosecutorial misconduct and reversed the conviction. *Id.* at 686.

It is improper for the State to argue that the jury may only find the defendant not guilty if it makes certain findings. Our courts have "repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wash. App. 209, 213, 921 P.2d 1076, 1078 (1996), citing *State v. Casteneda–Perez*, 61 Wash. App. 354, 362–63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), review denied, 118 Wash.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wash. App. 811, 826, 888 P.2d 1214, review denied 127 Wash.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wash. App. 869, 874–75, 809 P.2d 209, review denied 118 Wash.2d 1007, 822 P.2d 288 (1991). Such arguments misstate the burden of proof and the role of the jury. *Id.* Instead, the jury is "required to acquit unless it had an abiding conviction in the truth of [the witness'] testimony." *Id.* Similarly, courts have found that it is improper to argue that the jury may only acquit if it can articulate a reason for doubt. *State v. Emery*, 174 Wash. 2d 741, 759–60, 278 P.3d 653, 663–64 (2012)

> The argument starts with the phrase, "[I]n order for you to find the defendant not guilty." This is a bad beginning because a jury need do nothing to find a defendant not guilty. . . . This suggestion is inappropriate because the State bears the burden of proving its case beyond a

> reasonable doubt, and the defendant bears no burden. By suggesting otherwise, the State's fill-in-the-blank argument subtly shifts the burden to the defense.

Id. (internal citations omitted).

In this case, the State argued that in order to find Mr. Lizarraga-Canche not guilty, the jury had to say that any person can escape criminal responsibility by ignoring facts, by wishing away knowledge. As stated above, it is improper to argue to the jury that it can only acquit if it makes certain findings. The jurors are the sole judges of the credibility of witnesses, and if the jurors found Mr. Lizarraga-Canche credible, or even if his denial of knowledge that the car was stolen and about the date he was supposed to return create doubt, then the jury was not only allowed to, but was required to acquit. Arguing or implying that Mr. Lizarraga-Canche's denial of knowledge was not sufficient to acquit is a misstatement of the burden of proof and reasonable doubt. The jury need not find that Mr. Lizarraga-Canche ignored facts or wished away knowledge in order to find him not guilty. The jury was required to find him not guilty unless they found that the State had proven each element beyond a reasonable doubt.

c. *Mr. Lizarraga-Canche was Prejudiced.*

Although counsel did not object to these arguments at trial, this court should consider them for the first time on appeal because a misstatement of the burden of proof and reasonable doubt is flagrant and ill-intentioned. And, in this case, where the credibility of the witnesses was at issue and the defense on both charges hinged on Mr. Lizarraga-Canche's knowledge, this improper argument likely prejudiced Mr. Lizarraga-Canche.

4. Mr. Lizarraga-Canche Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient

performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherbv.* 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

As discussed above, the State committed misconduct in its closing argument and the misstatement of the law, the burden of proof, and reasonable doubt was extremely prejudicial in this case. Defense counsel did not object to the State's improper argument. Failure to object was clearly unreasonable in this case and there was clearly no strategical reason to fail to object.

5. This Court Should Not Impose Appellate Costs Because Mr. Lizarraga-Canche is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[1], 14.1(c)[2].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an

[1] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added).
[2] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

> obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Lizarraga-Canche was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 139-40). Non-mandatory legal financial obligations were waived by the trial court. (RP 525, CP 127-28). Mr. Lizarraga-Canche is unemployed, has debts, and has no assets. (RP 521). He is also now a convicted felon. Therefore, it is extremely unlikely that Mr. Lizarraga-Canche will be able to pay appellate costs. Therefore, this Court should exercise its discretion and

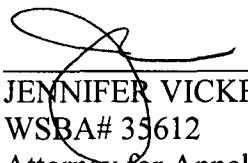
not award appellate costs in this matter, if Mr. Lizarraga-Canche does not substantially prevail.

I. CONCLUSION

In conclusion, Mr. Lizarraga-Canche's post-Miranda statements should have been suppressed because he did not knowingly and intelligently waive them. His conviction for bail jumping must be reversed and vacated because jeopardy terminated when the trial court found insufficient evidence. Also, Mr. Lizarraga-Canche was denied a fair trial due to prosecutorial misconduct and ineffective assistance of counsel; therefore, his should be granted a new trial.

Dated this 14th day of November, 2016.

Respectfully Submitted,



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STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. EDWIN A. LIZARRAGA-CANCHE, Appellant.	NO. 49191-5-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Bevier

Signed November 14th, 2016 at Tacoma, Washington.

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Transmittal Letter

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Case Name: State v Edwin Lizarraga-Canche
Court of Appeals Case Number: 49191-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Comments:

Appellant's Brief and Cert of Service are attached

Sender Name: Mary E Benton - Email: mbenton@co.pierce.wa.us

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